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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ITT RAYONIER, INCORPORATED (Port Angeles Division), Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB Nos. 970 and 1025 & 1042 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter is a consolidation of appeals from orders issued by respondent. Such orders pertain to a National Pollutant Discharge Elimination System Permit also issued by respondent. Hearing was held before the Pollution Control Hearings Board, Chris Smith, Chairman, W. A. Gissberg, and Art Brown, convened at Lacey, Washington, on July 13, 14, 15 and 16, 1976. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing.

Appellant was represented by its attorneys, Thomas H. Truitt and Steven M. Gottlieb of Truitt, Fabrikant, Bucklin & Lenzner, Washington,

D. C. and John M. Cary of Perkins, Coie, Stone, Olsen & Williams, Seattle. Respondent was represented by Charles W. Lean, Assistant Attorney General. Eugene E. Barker, Olympia court reporter provided recording services.

Having heard the evidence, having examined the exhibits, having heard the arguments and read the briefs of counsel, having considered exceptions of the parties and replies thereto, said exceptions being granted in part and denied in part, the Pollution Control Hearings Board makes the following

FINDINGS OF FACT

1. Upon enactment of the Federal Water Pollution Control Act Amendments of 1972 (hereafter "FWPCA") there was established a National Pollutant Discharge Elimination System (hereafter "NPDES"). The State of Washington elected to administer that system and issue NPDES permits within the state. The U. S. Environmental Protection Agency (hereafter "EPA") approved Washington's NPDES program.

2. FWPCA requires the EPA to issue "Guidelines" by which NPDES permits can set and require compliance with certain "effluent limitations" by 1977. EPA failed to issue such Guidelines for plants of Rayonier's type by the statutory deadline of October 18, 1973. Washington was nevertheless required to issue permits which would set and require attainment of specific effluent limitations by 1977.

3. Since EPA has, in the absence of official Guidelines, relied on informally developed discharge levels prepared for the now abandoned Refuse Act Permits Program, and since EPA would have to approve each state NPDES permit (§ 402, FWPCA), the new state NPDES permits were bas

on these Refuse Act limitations.

4. During the summer of 1973 appellant (hereafter "Rayonier") and respondent (hereafter "DOE") discussed the terms of Rayonier's yet to be issued state NPDES permit. EPA was advised of the progress of this discussion.

5. On November 27, 1973, the federal District Court for the District of Columbia ordered the EPA to issue Guidelines for plants of Rayonier's type by October 1, 1974. (N.R.D.C. v. Train, D.C., D.C. CA No. 1609-73.) At the time Rayonier's permit was issued, and before issuance, both Rayonier and DOE believed that EPA would promulgate applicable Guidelines by October 1, 1974.

6. In February, 1974, Rayonier and DOE resumed discussion of the effluent limitations proposed for Rayonier's state NPDES permit. Rayonier expressed its desire to appeal those effluent limitations. Both Rayonier and DOE concluded that there would be problems inherent in a state appeal of a state NPDES permit. The problems discussed included jurisdiction over EPA for securing witnesses and other evidence bearing upon EPA Refuse Act limitations, and the validity of a state NPDES permit when amended by state appeal but vetoed by EPA under § 402, FWPCA.

7. By letter of April 15, 1974, Timothy S. Williams, Esquire, General Counsel of Rayonier, first put in writing the concept ultimately enunicated in footnote f/ of Rayonier's state NPDES permit. Mr. Williams suggested this language:

> "The requirements of Paragraph S6.a.(3) relating to Biochemical Oxygen Demand (5-day) and suspended solids, when river flow is equal to or greater than 2000 cfs, and the

requirement of Paragraphs S2 through S6 relating to pH, shall be amended in accordance with effluent limitation guidelines defining best practicable control technology for sulphite dissolving pulp mills pursuant to Section 304(b)(1) of the Federal Water Pollution Control Act, when such guidelines shall become final." (Emphasis added.)

8. Apparently on May 8, 1974, word reached Rayonier's Mr. Williams, in New York, that DOE had proposed revised language along the lines of that suggested by Mr. Williams' April 15, 1974 letter, above. This language was:

"The BOD and SS limits will be modified to be consistent with the applicable final effluent guidelines when promulgated by EPA in the Federal Register."

9. By letter of June 14, 1974, Rayonier's Mr. Williams responded to this suggestion by offering this further modified language:

"The BOD and SS limits will be modified to be consistent with the applicable final effluent guidelines when promulgated by EPA in the Federal Register, or as thereafter modified by final action consequent upon any appeal from such guidelines." (Emphasis added.)

Mr. Williams' letter continues by stating:

"It seems to me that this preserves the position of all parties and allows final guidelines, consistent with the statute, to control."

Lastly, Mr. Williams' letter stated:

"Since numbers in the permit now, or as amended following publication in the Federal Register, would govern until amended further, there should be no concern on the part of the Department or EPA that extended litigation on the Guidelines might prevent compliance."

10. Mr. James C. Knudson was DOE's principal technical negotiator in the matter of Rayonier's state NPDES permit. On the eve of the permit's issuance, Mr. Knudson wrote two memoranda. The first was dated August 13, 1974, and was directed to DOE's Mr. Bollen who was Mr. Knudson's superior. It said in pertinent part:

"I would also recommend that we accept the requested modification of footnote f/ on the bottom of page 5 to add the suggested words '. . . or if [sic] thereafter modified by final action consequent upon any appeals from such guidelines.' If this is explained this would allow ITT to incorporate any limits that may come out of a court challenge of EPA Guidelines, otherwise the mill would be committed to levels that EPA provocated [sic] the way the footnote finally stands."

The second memorandum of Mr. Knudson was dated August 22, 1974 and was directed to Mr. Nielson of EPA. It said, in pertinent part:

"Footnote f/ has been expanded to include the wording, 'Or as thereafter modified by final action consequent upon any appeal from such guidelines.' This request came from the ITT legal people, who did not want to be locked into the promulgated guideline numbers if a court action resulted in less stringent guideline numbers."

11. After EPA approved all revisions, including footnote f/, DOE issued state NPDES permit No. WA-000079-5 to Rayonier on August 30, 1974.

12. Section "S3" of the permit is entitled "Final Effluent Limitations and Monitoring Requirements." Footnote f/ of that section originally read:

"The biochemical oxygen and suspended solids limitations will be modified to be consistent with the applicable final effluent guidelines when promulgated by EPA in the Federal Register or as thereafter modified by final action consequent upon any appeal from such guidelines."

This is the same wording proposed by Rayonier's Mr. Williams by letter to the DOE of June 14, 1974.

13. Section "S4" of the permit is entitled "Schedule of Compliance." The salient due dates included there are:

(a) Submission and Approval of Final Plans by: October 1, 1975.

(b) Award of Contract or Equivalent by: March 1, 1976.

(c) Commencement of Construction by: July 1, 1976.

(d) Completion of Construction by: March 1, 1977.

(e) Attainment of Operational Level: July 1, 1977.

14. On September 30, 1974, Rayonier commenced a narrowly drawn and timely appeal (PCHB No. 712) of its state NPDES permit. There was no challenge made to the biochemical oxygen and suspended solids limitation mentioned in footnote f/. Rather, only pH and toxicity limitations were challenged with the result that pH was added to footnote f/ and toxicity (an exlusively state-imposed limitation) was otherwise adjusted.

15. On November 1, 1974, the federal District Court for the District of Columbia, retaining jurisdiction in N.R.D.C. v. Train, (see Finding of Fact 5, supra), extended the due date for applicable EPA Guidelines to April 17, 1975. On April 24, 1975 the Court extended the due date to December 15, 1975.

16. On September 30, 1975, Rayonier submitted engineering plans to DOE for an oxygen-activated secondary treatment system for Rayonier's mill. This system was planned by Rayonier for achievement of the effluent limitations in S3 of Rayonier's permit, and these plans were submitted to conform with the compliance schedule in S4 of Rayonier's permit.

17. The testimony of Donald O. Provost, a member of the DOE technical staff and a superior of Mr. Knudson, shows that as late as October 24, 1975, DOE was willing to accept final plans from Rayonier based upon EPA Guidelines. (Exhibit Provost 1, pgs 2-3)

18. On November 3, 1975, the DOE, by letter of Mr. Burkhalter,

rejected Rayonier's September 30, 1975 engineering plans for lack of specificity and finality.

19. On November 25, 1975, Rayonier furnished additional engineering reports and a letter over signature of Mr. Rogstad but drafted by Mr. Williams, General Counsel of Rayonier. That letter notified DOE that Rayonier believed its engineering plans to be specific and final. In addition, however, that letter also notified DOE that Rayonier construed footnote f/ to require changes in the submitted plans to conform to EPA Guidelines expected then on December 15, 1975. Furthermore, DOE was notified that if EPA Guidelines were found agreeable to Rayonier, Rayonier would simply change the submitted plans and continue on schedule by awarding construction contracts by March 1, 1976. Lastly, DOE was notified that if EPA Guidelines were found disagreeable to Rayonier, Rayonier would initiate a federal appeal and seek a stay of the remaining dates in the S4 compliance schedule of its permit.

20. On December 12, 1975, the federal District Court for the District of Columbia, retaining jurisdiction in N.R.D.C. v. Train, (see Findings of Fact 5 and 15, supra) extended the due date for applicable EPA Guidelines to January 30, 1976.

21. On December 31, 1975, DOE issued a compliance order (DE 75-226) to Rayonier requiring submission of a final engineering plan, as defined in the order, for the review and approval of the department.

22. On January 29, 1976, Rayonier appealed that compliance order to the Pollution Control Hearings Board which matter is PCHB No. 970.

23. On February 19, 1976, EPA promulgated applicable Guidelines.

("Interim Final Effluent Limitations and Guidelines for Low-Alpha Dissolving Sulfite Pulp Subcategory of the Pulp, Paper and Paperboard Point Source Subcategory," 41 Fed. Reg. at 7677 and 7682-3.)

24. On February 26, 1976, Rayonier filed a petition in the Ninth U. S. Circuit Court of Appeals challenging the EPA Guidelines. This petition was transferred, upon motion of the government, to the Third U. S. Circuit Court of Appeals on April 30, 1976.

25. On February 27, 1976, Rayonier filed with DOE separate applications to "Stay" the S4 compliance schedule of the permit and to "Modify" the S4 compliance schedule of the permit. Both applications sought deferment of planning and construction of the pollution control facilities required by the S3 effluent limitations of the permit until final appeal of EPA Guidelines.

26. On March 15, 1976, Mr. Charles Lean, Esquire, Assistant Attorney General assigned to DOE, wrote an internal memorandum to other officials within DOE. Concerning Rayonier he wrote:

> "The permit contains a footnote indicating that the effluent limitations will be modified to incorporate any EPA guideline numbers. EPA's guidelines containing more stringent limitations are now out. We must decide: (a) Should we modify the effluent limitations? (b) If so, should we also modify the production basis? and (c) What form should any modification take?" (Emphasis added.)

The memorandum went on to apprise the others of the applications to "stay" or "modify" the permit which Rayonier had filed on February 27, 1976.

27. On March 24, 1976, Messrs. Roe, Provost, Burkhalter, Knudson and Lean of DOE met to discuss the February 27 Rayonier applications to defer planning and construction. During this meeting six alternative

courses of action were considered:

(1) Grant the applications in total.

(2) Modify the permit to extend the compliance schedule for a set period of time.

(3) Grant the stay of the compliance order while denying the applications for modification.

(4) Modify the permit to delete footnote f/.

(5) Modify the effluent limitations to incorporate the Guidelines and probably EPA's new method of computing production by annual average.

(6) Deny the modification requests and "freeze" the effluent limitations at those in existence at the time the engineering plans were due (October 1, 1975).

28. On March 29, 1976, Mr. Lean, counsel to DOE, wrote a memorandum to Mr. John A. Biggs, Director of DOE, which said, in pertinent part:

> "The recommendation reached at our meeting was to "freeze" the effluent limitations at those which are currently in the permits, and for the purposes of these permits to ignore any EPA guidelines or modifications thereto."

29. On May 17, 1976, John A. Biggs, Director of DOE, issued an order denying Rayonier's applications for modification and stay (Docket No. DE 76-26).

30. On May 21, 1976, Rayonier appealed that order to the Pollution Control Hearings Board which matter is PCHB No. 1025.

31. Each of the facts enumerated I - IX in the document dated July 12, 1976, and entitled "Stipulated Facts" is hereby found as fact.

32. Throughout the interchange between DOE and Rayonier which is relevant to the matters before us, Rayonier has sought in good faith a plain and simple statement of the conduct required of it by FWPCA and at no time has engaged in dilatory or evasive tactics.

33. Any Conclusion of Law hereinafter recited which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

1. This appeal arises from a single sentence: footnote f/ of Rayonier's state NPDES permit. From that sentence the parties to this appeal have joined issue on two ultimate questions:

a. Shall the effluent limitations subject to footnote f/, and now appearing in Rayonier's permit, be replaced: first, by limitations consistent with applicable EPA Guidelines as promulgated and, thereafter by limitations consistent with such Guidelines as altered by appeal?

b. Shall Rayonier's planning and construction of the pollution control facilities required by effluent limitations be deferred until appeal of EPA Guidelines has been completed?

These issues may be denominated "replacement" and "deferment," respectively.

2. Replacement: DOE has contended for an interpretation of Rayonier's permit which "freezes" the effluent limitations as they existed on October 1, 1975, (the date for DOE approval of Rayonier's final plans). We disagree.

The permit issued to Rayonier is an administrative order. As

such it should be construed by looking first at its terms, and then, only if it is ambiguous on its face, by looking to the intention of the issuing administrative agency. Airport Coach Service, Inc. v. City of Fort Worth, 518 S.W.2d 566, 574 (Tex. Ct. of Civ. App. 1974), Reddi-Wip Company of Philadelphia, Inc. v. Hardin, 315 F. Supp. 1117, 1118-19 (E.D. Pa. 1970).

The plain meaning of the words used in footnote f/ could not be more explicit on the issue of replacement:

> "The biochemical oxygen demand, suspended solids and pH limitations will be modified to be consistent with the applicable final effluent guidelines when promulgated by EPA in the Federal Register, or as thereafter modified by final action consequent upon any appeal from such guidelines."

There being no ambiguity in the permit on the replacement issue, there is no need to resort to the underlying intent of DOE.[1]

We conclude that footnote f/ requires that the effluent limitations which are subject to it must be replaced, first, by limitations

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1. DOE argues that the text of footnote f/ is an adjunct of section S3 of the Rayonier permit entitled "Final Effluent Limitations and Monitoring Requirements." Therefore, DOE contends, footnote f/ is not an element of section S4 entitled "Schedule of Compliance." By reading these provisions separately and noting that neither explicitly refers to the other, DOE concludes that footnote f/ of S3 only lasts until engagement of section a(2)(b) of the compliance schedule, S-4, on October 1, 1975.

We cannot agree with this sharp-knifed dissection of the permit. S4 is the schedule for achieving S3 and, without special references or provisions on how the two inter-relate, our conclusion is that all of S3--including footnote f/--is contemplated in each step of the S4 compliance schedule.

This unstrained reading of the two permit provisions was held by DOE even after October 1, 1975, according to testimony of Mr. Provost of DOE. His testimony shows that as late as October 24, 1975, DOE was willing to accept final plans from Rayonier based upon EPA Guidelines then expected to be issued by December 15, 1975. (See Findings of Fact 15 and 17, supra.)

consistent with applicable EPA Guidelines as promulgated, and, thereafter, by limitations consistent with such Guidelines as altered by appeal.

3. Deferment--Footnote f/ itself: Nowhere in footnote f/ itself is there an explicit reference allowing or disallowing any deferment of compliance pending appeal of EPA Guidelines. Equally reasonable inferences may be drawn in support of or against such deferment. We conclude that the permit is ambiguous on this deferment issue.

As stated earlier, ambiguity in the wording of an administrative order necessitates resort to the intent of the administrative agency Airport Coach Service, Inc., supra and Reddi-Wip, supra. To determine the intent of DOE, however, it is proper for us to consider the proceedings which surround the issuance of the permit, including communications from Rayonier to DOE. See Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250, 1273 (3d Cir. 1974); Cedar Rapids Steel Transportation, Inc. v. Iowa State Commerce Comm'n, 160 N.W.2d 825, 838 (Iowa, 1968).

The evidence provides several writings which shed light upon whether DOE intended that footnote f/ itself provide deferred compliance. These include Rayonier's letter of June 14, 1974, (Exhibit S-8), DOE memoranda written in August, 1974 (Exhibits S-10 and S-11) and Rayonier's letter of November 25, 1975 (Exhibit S-14).

By our Finding of Fact 9, supra, we found that Mr. Williams of Rayonier communicated to DOE, by letter dated June 14, 1974, the wording that would become footnote f/. In that same letter the author of footnote f's/ wording declared:

"Since numbers in the permit now, or as amended following publication in the Federal Register would govern until amended further, there should be no concern on the part of the Department or EPA that extended litigation might prevent compliance."

Rayonier has characterized this statement as one seeking "to assure DOE that in the event EPA failed to issue Phase II Guidelines applicable to its Port Angeles facility Rayonier would nonetheless be required to build to a specific parameter." (Rayonier's Post-Hearing Memorandum pgs 31-32). We cannot agree.

In the first place, the plain language of Mr. Williams' statement addresses issuance and appeal of Guidelines, not the failure to issue. Secondly, the statement affirmatively rejects and disclaims deferred compliance due to extended litigation of the Guidelines alone. Thirdly, since both Rayonier and DOE expected Guideline issuance by October 1, 1974, when this statement was made (see Finding of Fact 5, supra) we conclude that Mr. Williams' statement above does not contemplate EPA delay nor the question of defered compliance in that event.

By our Finding of Fact 10, supra, we found two memorandums written prior to the permit's issuance, in August, 1974, by Mr. Knudson of the DOE technical staff. We are convinced that Mr. Knudson wrote these memorandums without foreseeing any conflict between the introduction of appealed Guidelines into the permit and the permit's compliance schedule. Nothing in those memorandums expressly deals with such a conflict nor the question of deferred compliance in that event.

By our Finding of Fact 19, supra, we found that Rayonier sent a

letter to DOE well after the permit's issuance under date of November 25, 1975. That letter drafted by Rayonier's General Counsel, Mr. Williams, stated, in pertinent part:

> "It is our present intention to proceed in compliance with permit terms to the extent practicable in the ambiguous situation caused by EPA delay . . .
> As we have always attempted to be entirely candid in our relations with the Department, I would like to add that our intentions may change if the EPA guidelines as promulgated are, in the opinion of our attorneys, legally defective . . . If there is no change in EPA's approach, we will doubtless wish to appeal the guidelines, and, to avoid irreparable injury which would result should the appeal be successful after major investment in facilities improperly required, we may then seek a stay in the permit requirements." (Emphasis added.)

When Rayonier wrote these words to DOE, EPA delay had already prevented a Guideline appeal from commencing until well within the boundaries of the permit's compliance schedule. Yet this letter, drafted by General Counsel of Rayonier, makes no contention that footnote f/ provides an indiscriminate stay as a matter of right in that situation.

From these writings and other evidence, we conclude that DOE did not intend that footnote f/ defer compliance because of extended litigation on appeal of the Guidelines. We conclude also that DOE did not intend that footnote f/ defer compliance in the event of EPA delay in Guideline issuance if, indeed, DOE had intent on that subject. Footnote f/ itself therefore provides no deferral of permit compliance.

4. Deferment--Footnote f/ Combined with EPA delay as ground for modification.

Rayonier has argued that even if footnote f/ itself does not defer permit compliance during their federal Guideline appeal, EPA's delay

combined with footnote f/ should merit our order "modifying" the permit to accomplish the same end. The word "modify" appears within WAC 173-220-190(2). This section, if unassisted, would burst at the seams if required to clothe the relief which Rayonier has requested.

WAC 173-220-190(2) allows modification:

> ". . . of a schedule of compliance or operating condition in an issued permit if it determines good and valid cause (such as an act of God, strike, flood, material shortage, or other event over which the permittee has little or no control) exists for such revision."

In urging the applicability of this section, Rayonier has offered a one-part solution for a two-part problem. Acts of God, strike, flood or material shortage are occurrences which in and of themselves may constitute good and valid cause for modification of a NPDES permit.

The cause for modification advanced by Rayonier, however, is that EPA delay in promulgating Guidelines has prevented Rayonier's Guideline appeal from commencing until well within the compliance schedule for constructing to present effluent limitations. We have held that footnote f/, in turn, has guaranteed that those limitations shall be revised pursuant to the outcome of that federal Guideline appeal.

It will be observed that the above cause, unlike acts of God, strike, flood or material shortage, does not of itself render permit compliance oppressive. Rather, it is a situation which yields oppression in direct proportion to the outcome of the federal Guideline appeal. This is so because one may speculate that the effect of federal appeal will be to reduce the stringency of the present limitations. Construction according to present limitations, in the meantime, could

thus result in the building of an expensive "white elephant." Yet, at the same time, one may speculate that the effect of federal appeal will be to affirm the stringency of present limitations in every respect. Construction according to present limitations, would then be the doing of what ought to be done. An order deferring construction in this latter situation would lead to forlorn abandonment of the Congressional goal of reaching the effluent limitations by July 1, 1977.

We believe that a showing of good and valid cause for the modification of a NPDES permit requires more than speculation. We hold that where, as here, the oppression caused by compliance with a NPDES permit is directly dependent upon the outcome of litigation which may revise the permit's terms, a finding of good and valid cause for modification cannot be made without a showing by the applicant of (1) probability of eventual success in the litigation and (2) substantial injury if permit compliance is not deferred until the end of litigation.[2]

We conclude that Rayonier has failed to show that it will probably be successful in its federal Guideline appeal or that it will be injured if compliance is not deferred until the outcome of that appeal.

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2. This holding is consistent with the well recognized rule in Washington that one seeking relief by temporary or permanent injunction must show well grounded fear of invasion of a right, and the acts complained of must establish an actual and substantial injury or an affirmative prospect thereof. Neilson v. King County, 435 P.2d 664, 72 Wn.2d 720 (1967), LeMaine v. Seals, 287 P.2d 305, 47 Wn.2d 259 (1955), Isthmian S.S. Co. v. National Marine Engineers, 247 P.2d 549, 41 Wn.2d 106 (1952), Senior Citizens League v. Dept. of Social Security of Washington, 228 P.2d 478, 38 Wn.2d 142 (1951), King County v. Port of Seattle, 223 P.2d 834, 37 Wn.2d 338 (1950), State ex rel Hays v. Wilson, 137 P.2d 105, 17 Wn.2d 670 (1943). See also: RCW 7.40.020.

Rayonier therefore has failed to establish good and valid cause for the modification of its NPDES permit.

5. Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Pollution Control Hearings Board enters this

ORDER

1. The compliance order appealed from (DE 75-226) and order denying stay or modification appealed from (DE 76-26) are each hereby affirmed for the reasons and in the respects above stated.

2. This matter is remanded to DOE with instructions to replace the effluent limitations subject to footnote f/, first, by limitations consistent with applicable EPA Guidelines as promulgated in the Federal Register and, thereafter, by limitations consistent with such Guidelines as modified by final action consequent upon any appeal from such Guidelines.

3. This Order shall be stayed at such time as, and if, a state appeal is taken thereto, until such time as all such judicial review proceedings have terminated, unless a court for good cause orders otherwise. During any period that this stay is operable, Rayonier shall not be required to comply with the DOE compliance order (DE 75-226).

DATED this 5th day of November, 1976.

POLLUTION CONTROL HEARINGS BOARD

Art Brown
ART BROWN, Chairman

W. A. GISSBERG, Member

CHRIS SMITH, Member